FILED
MAY 30 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION

DAVID E. WEATHERWAX
STEPHEN E. WILLIAMS
Consolidated Gas
Transmission
Corporation
445 West Main Street
Clarksburg, WV 26301
(304) 623-8340

JOHN E. HOLTZINGER, JR.
Counsel of Record
KAROL LYN NEWMAN
KEVIN J. LIPSON
NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036
(202) 955-6600

Counsel for Petitioner
Consolidated Gas
Transmission Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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ARGUMENT

The Government's and New York's opposition attempt to characterize the dispute in this case as merely one of whether the Commission properly interpreted a settlement agreement. The significance of the petition, however, lies in the fact that the Commission's orders are simply a vehicle carefully crafted to deny pipelines the full retroactive effect of this Court's decision in *Public Service Commission v. Mid-Louisiana Gas Co.*[1]

In *Mid-Louisiana*, this Court concluded that when Congress enacted the NGPA it intended that natural gas produced by interstate pipelines be priced under the statutory scheme established in NGPA Title I: "an incentive pricing scheme that is wholly divorced from the tradi-

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[1] 463 U.S. 319 (1983).

tional historical-cost methods applied by the Commission in implementing the NGA." [2] The effective date of Title I was December 1, 1978. Thus, *Mid-Louisiana* required the Commission to price all of Petitioner's pipeline production under Title I as of that date.

Despite the Commission's recent acknowledgement that it is required to give full retroactive effect to *Mid-Louisiana*,[3] the orders on review in this case maintain that the Commission has the discretion to determine whether and under what circumstances *Mid-Louisiana* will be applied retroactively:

> The Commission is obligated to implement the mandate of the *Mid-La* court . . . . Nevertheless we do have the duty to determine *the extent to which* we will implement *Mid-La* retroactively . . . .[4]

The Commission was faced with the following facts at the time that it issued the orders under review:

1. Petitioner had taken the firm view that all of its pipeline production was required by law to be included in its purchased gas cost adjustment ("PGA") and priced at NGPA levels; [5]
2. Petitioner had specifically provided in its Commission-approved tariff for the collection of statutory prices for *all* pipeline production; [6]
3. Petitioner had established its right to collect NGPA prices in the Fifth Circuit's *Mid-Louisiana* decision;
4. The Fifth Circuit denied a stay and rehearing of that decision;

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[2] *Id.* at 333.

[3] Order No. 391, 49 Fed. Reg. 33849, 33855-57 (1984).

[4] App. 24a (emphasis added).

[5] Pet. at 3-6.

[6] Pet. at 12-13.

5. Petitioner had filed for, and was permitted by the Commission to collect, NGPA prices for all of its pipeline production from December 1, 1978; and
6. No party objected to or protested Petitioner's authority to collect those prices on the grounds that the 1980 settlement barred such collections.

Confronted with these facts, the Commission sought to eviscerate this Court's *Mid-Louisiana* decision by applying an order it had written in *El Paso Natural Gas Company*[7] to all pipelines seeking to implement *Mid-Louisiana* for past periods—even in totally inapposite situations. In *El Paso*, the settlement agreement provided that old pipeline production would be priced on a cost-of-service basis.[8] Disregarding the fact that Petitioner's settlement did not make a similar statement, as the Commission admits,[9] the Commission used *El Paso* to assert that interstate pipelines, even those actively litigating their right to collect NGPA prices, presumably relinquished that right for some other, unstated benefit.

Petitioner was not the only pipeline to fall victim to this *post facto, pro forma* decisionmaking.[10] Mid-Louisiana Gas Company, Kentucky West Virginia Gas Company, and National Fuel Gas Supply Corporation all have appeals pending in the United States courts of appeals raising the same question.[11]

It is, therefore, not Petitioner that seeks to use *Mid-Louisiana* to recapture benefits that it bargained away. Rather, it is the Government that seeks to retain the re-

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[7] 20 F.E.R.C. (CCH) ¶ 61,443 (1982) *reh. denied*, 21 F.E.R.C. (CCH) ¶ 61,219 (1982), *appeal docketed*, No. 82-2172 (D.C. Cir. Sept. 30, 1982).

[8] App. 25a.

[9] App. 30a.

[10] Pet. at 11 n.28.

[11] Petition at 11, n. 28. Other interstate pipelines have not received retroactive collections, for varying periods of time, but have opted not to pursue the matter.

sults of its unlawful and vacated regulations by restricting the application of *Mid-Louisiana* to a prospective period.

The Government points to the specific reservation of the pipeline production issue in the 1979 rate case settlement as evidence that the issue had been compromised in the 1980 rate case settlement. Even if it were appropriate to look to the 1979 settlement to resolve this issue,[12] there were valid reasons for the inclusion of the reservation language in the 1979 settlement, not present at the time of the 1980 agreement. In the 1979 agreement, Consolidatd withdrew its claim of "special circumstances" for *new* pipeline production.[13] As a result, the agreement terminated several earlier proceedings related to pipeline production, and reserved the pipeline production pricing issue in two other dockets.[14] The claim of "special circumstances" was not an issue in the 1980 rate case.

In any event, if all the parties to the 1980 rate case settlement had intended to compromise their litigation position in *Mid-Louisiana*, the unanswered question remains why *none* of the parties protested Petitioner's PGA

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[12] The Government's argument that Petitioner bargained away its right to the *Mid-Louisiana* benefits in the 1980 rate case settlement is based on the erroneous premise that NGPA pricing was an issue in that case. The Commission's regulations in effect at that time provided that Petitioner's PGA proceedings were the *exclusive* forum for the resolution of this issue. In those PGA proceedings, Petitioner had preserved its right to NGPA prices for its pipeline production in its PGA filing and through a tariff amendment. Pet. at 4-5.

[13] Under a claim of "special circumstances," a pipeline company seeks cost of service pricing for its pipeline production, rather than the area or nationwide prices.

[14] Later general rate case settlements explicitly reserved the *Mid-Louisiana* issue because the theory advanced by the Commission in *El Paso* had already been raised by the parties to that proceeding. *See* El Paso Natural Gas Co., 18 F.E.R.C. (CCH) ¶ 61,305 at p. 61,650 (1982).

filing to collect NGPA prices for its old pipeline production retroactively to December, 1978. The petition and this reply provide the answer: The Government's contract "interpretation" argument is merely a ploy to divert this Court's attention from the Commission's recalcitrance.

CONCLUSION

The Writ should be granted.

Respectfully submitted,

DAVID E. WEATHERWAX
STEPHEN E. WILLIAMS
Consolidated Gas
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Corporation
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